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Dear Fred:

I appreciate the opportunity to comment on the report of the Working Group on Intelligence Oversight and Accountability, Task Force on Intelligence and Counterintelligence, American Bar Association Standing Committee on Law and National Security. The report, entitled "Oversight and Accountability of the U.S. Intelligence Agencies: An Evaluation," represents a commendable effort to address a very complex, important, and timely topic relating to the conduct of intelligence activities. It generally concludes that the existing intelligence oversight mechanisms--both internal and external--are working well and need not be modified to any great extent. I wholeheartedly support that conclusion, but wish to convey my thoughts and concerns regarding certain segments of the report that I believe are in need of revision or clarification to ensure a product that serves as an unambiguous and persuasive lodestar in the discussions on oversight for the future.

There are four general observations that I would like to convey before remarking on specific provisions in the report that I believe should be reviewed. First, it seems to me that the drafters assume too great a role for in-house counsel in the oversight process. As you know, some critics of the Intelligence Community likely will find something objectionable in almost any activity that is conducted in the U.S. national interest, whether or not there is any legitimate question as to the legality of those operations. In-house counsel cannot solve every problem that arises, and should not be expected to. It is the responsibility of management and senior policy makers to make the final determinations with respect to particular operations, with appropriate advice of counsel. Although I agree that lawyers can provide a measure of objectivity and perspective that can be an invaluable resource to intelligence managers, I believe your report goes too far in that it seems to suggest that a review by legal counsel of agency operations at the outset and throughout their conduct will solve all the oversight and accountability problems that you have raised. As much as we as lawyers may not

wish to acknowledge it, a lawyer's advice as to the wisdom as opposed to the legality of a particular course of action is only one factor to be considered by the decision makers. Thus, I agree that in-house counsel should--as they in fact do--continue to play a significant role in the review and conduct of intelligence operations, but think that certain segments of the report (more specifically addressed in the attachment to this letter) are based on the erroneous premise on the role of agency lawyers.

I also think the report has failed to place sufficient emphasis on a most serious problem facing the Intelligence Community today; namely, the efforts by Congress to involve itself in the micromanagement of intelligence activities. This has been evidenced in many ways over the past several years with increasing frequency. As you know, there are not two oversight committees today, but, in fact, there are at least four. The report should discuss the significant oversight roles the House and Senate Appropriations Committees play, notwithstanding the language of the National Security Act which provides for two intelligence committees--HPSCI and SSCI. I think this is one indication of a general tendency in the report to focus more intently on the Executive Branch role and response to oversight requirements, without a corresponding attempt to take a critical look at the role of Congress and how it is carried out.

An additional general observation regarding the report is that the questionnaire should not be given the prominence it has received in the report because the conclusions and recommendations are those of the drafters, and because the statistical significance of the results of the individual questions is so minor; only 28 responses were received. I think a decision will have to be made to determine whether or not this report is to be a report of a limited number of individuals based upon personal observations and considerations, with some regard for the comments received in the questionnaire, or whether the questionnaire itself must or should take on a significance of its own. If the former is the case, the responses to the questionnaire should be deemphasized and, perhaps, attached as an appendix to the report itself. Alternatively, more careful consideration could be given to the questionnaire and the responses so that the report will reflect more clearly than it now does which comments are those of the respondents, which are those of the drafters, and whether there is any particular significance to the responses that have been included as opposed to those which have not. I think it is inappropriate, for example, to quote in full the comments on respondents who are in the minority of an issue, without including a representative majority statement. The inclusion of articulate and minority views only, in my view, detracts from the overall persuasiveness of the report and leads to an ambiguity that is easily remedied.

Finally, it seems to me that the report should be revised to bring it sufficiently up to date. Although the drafters obviously do not have complete access to information relevant to intelligence oversight, you may wish to circulate to some of the initial interviewees and other knowledgeable persons a request for any comments they may have in light of any changed circumstances or recent events. For example, covert action reporting procedures between the DCI and the intelligence committees are now in existence, CIA lawyers are playing an increased role in review of covert operations (see discussion in attachment), and efforts are being made by Congress to clarify the reporting requirements of the National Security Act. These events--all subsequent to the preparation of the ABA report--are relevant to the topic of inquiry and provide perspective not apparent in the current draft.

I hope these comments, and additional comments on specific segments of the report that I have attached, will be useful in your efforts to edit and revise the report. I wish to state again that I believe the report represents a worthwhile and commendable effort. Please feel free to contact me if you have any questions or further thoughts.

Yours truly,

Stanley Sporkin

Attachment

OVERSIGHT AND ACCOUNTABILITY OF THE U.S.
INTELLIGENCE AGENCIES: AN EVALUATION

- Page 11 The report discusses the organizational system of the staff of the SSCI, and characterizes the activities of the SSCI staff as less coherent than those of the HPSCI, at least in part because of the "designee" system. Recent changes in the SSCI leadership and staff have lead to SSCI organizational changes that may alter the current discussion on this topic. The drafters may find useful to speak with staff members and provide an updated discussion on this issue.
- Pages 11-12 The report in its discussion of the establishment of a congressional oversight system suggests wrongly that the intelligence committees existed at the time of the enactment of the Hughes-Ryan Amendment to the Foreign Assistant Act of 1961, in December 1974. This impression can be remedied by adding the words "that exist today" at the end of the paragraph at top of page 12.
- Page 20 The report is incorrect in its characterization of the role of the Attorney General with respect to current approval mechanisms. I suggest the drafters contact the Department of Justice for an updated discussion of the committees on which the Attorney General sits.
- Page 28 It is not entirely correct to say no question has been raised about prior notification, as the report states at the top of page 28. Over the past year, there has been considerable public discussion and some accusation--although unjustifiable--that Congress was not informed in advance by the Executive as provided in the National Security Act.
- Page 28 The second full paragraph at page 28 should be modified by deleting the reference to "dogged ideological opposition." That language is inflammatory, unnecessary and inappropriate.
- Page 30 The discussion of congressional activities relating to funding of the "contras" is

confusing. It is not clear whether the citation to the Defense Appropriation Bill was intended to refer to the bill for fiscal year 1985, or to 1984. In addition, the provision seems to make no distinction between Senate and House action that resulted in legislation, and Senate and House action that ultimately did not. Finally, the language discussed in the approved Defense Appropriations Bill did not contain language with respect to the "overthrow" of the Sandinista government. Instead, the language prohibited assistance, direct or indirect, to military or paramilitary activities in Nicaragua.

Page 34 It is incorrect to state that Executive Order 12333 "cuts back on the primacy of the DCI's responsibility." A careful reading of the Executive Order leads to the conclusion that the DCI is equally if not more responsible for ensuring the quality of intelligence product than under the previous Executive Order.

Page 39 The answer to question 3 on page 39 indicates that 85% of the respondents agreed with the statement that the provision of intelligence should be an objective and nonpolitical activity. That 15% obviously did not agree with that statement is astonishing. I think the limited number of the responses [only 28] suggests the unreliability of a statistical response in this questionnaire.

Page 53 A related problem with the responses to the questionnaire appears at page 53, where the drafters have chosen to include a comment that reflects a minority position, without including any statement of the majority view. On this question, 46% indicated that they believe there are sufficient protections to insulate the intelligence process from political bias, while only 14% answered in the negative. Nevertheless, the report includes only a comment that indicates "politicization of the intelligence system remains a critical problem." The ensuing discussion suggests a bias in the report itself that may not have been intended. A similar problem occurs at page 55 where 43% answered in the affirmative and 57% answered in the negative on the need

for a joint intelligence committee. The drafters, however, chose to include the comment of one of the minority. It would be more appropriate to summarize the views presented by the respondents rather than simply to quote the view of a respondent whose position was the minority position. A similar problem occurs at page 59 on whether the DCI should serve for a fixed term.

Page 68

The footnote at page 68 states that the "principal of objectivity appears to receive little emphasis at the current time in the professional ethic of the Intelligence Community". That statement is totally without foundation, and no support for it is indicated in the report. Either the drafters should support such a bold statement with facts or revise the provision in a way that makes it clear that this is the sheerest of speculation and conjecture.

Page 70

The drafters on pages 70 and 71 engage in a significant discussion on the likelihood of success of covert action operations in the face of congressional opposition and considerable controversy. While it is valid to point out that the ability to carry out covert operations will be increasingly difficult as the nature of those operations becomes public, the report leaves the impression that covert action is inappropriate solely because it may be controversial, and that disclosure of an activity ultimately will kill the program. It weighs in favor of stopping the action rather than changing the oversight system. This realistically leaves the Executive Branch with little or no alternative and fails to place any of the blame on Congress. I do not believe that the drafters intended this conclusion to be drawn; thus, some revision appears to be in order. This specific provision, as well as a general tendency in the report to focus on problems from the perspective of the Executive Branch, while focussing less on the deficiencies in congressional oversight, is a serious flaw in the report.

Page 75-77

The discussion on the effectiveness of internal oversight mechanisms places too much emphasis

on the role of the Offices of General Counsel within the Intelligence Community. It fails to recognize that activities that may be legal may be unwise, and that even activities that are both legal and wise may still raise significant questions and arouse public controversy after their implementation. Moreover, to cite the MKULTRA program seems inappropriate without further explanation. That activity occurred before the current oversight mechanisms were in place. The reference can be read as an attempt to tarnish any activity that does not receive attorney review because it conjures up a worst case scenario. However, there is nothing that gives lawyers the exclusive right to exercise of good judgment, or permits only intelligence officers to make errors in judgment. Oversight need not and should not be performed only by attorneys.

Page 77

The example cited on page 77 with respect to the "assassination manual" further suggests that the mere fact of controversy means that an activity should have been reviewed by lawyers in advance, and that the controversy resulted from a reduction in the role of counsel in reviewing ongoing covert action programs. That is simply not the case. There is no indication that any illegalities occurred, and it is unfair of the drafters to imply that the mere allegation of an illegality suggests that the charges are valid, that lawyers should have reviewed an activity, or that legal review would necessarily have led to a different result. With respect to the example cited, the problem was acknowledged to be one of command and control and did not relate to any reduction of the role of counsel. I do not believe the drafters really expect in-house legal counsel to solve all such problems, but the report leaves the impression that was the intent. I think further editing is in order.

Moreover, since the preparation of this report, at CIA the lawyers have played an increased role in the review of certain ongoing covert action programs. This is advisable and the report is correct in counseling it, but it should be noted that counsel cannot and should not as a practical matter be so close to an

activity that they lose the objectivity so necessary to ensure appropriate and effective review.

Page 78

The drafters have stated that CIA has (1) not become a policy-making organization by default, but (2) develops and advances its own institutional views with respect to foreign policy matters, and (3) has been politicized because the Director is a friend of the President. I think the drafters should beware of making general and inconsistent statements with little or no evidence to substantiate them. The drafters cannot have it both ways. Either CIA is developing its own views, or has no objectivity because of the demands of the Administration (see pages 68-69). A reasonable interpretation of what the drafters have done has been to attempt to criticize the Agency regardless of its actions, in order to prove the point that CIA has lost its objectivity. That effort appears to be unwarranted and unsubstantiated. If there is evidence that the CIA either is politicized, or is establishing independent views, that evidence ought to be presented. Alternatively, the report should be reviewed carefully from an editorial standpoint to ensure a basic consistency and logic that does not mislead the reader or lead to unwarranted and unsupportable conclusions.

Page 81

The drafters note that the respondents to the questionnaire indicated that the existing mechanisms of oversight and accountability were adequate. This conclusion drawn by the drafters appears to be somewhat slanted in that just as many people concluded they had no comment or did not know how to respond.